traffic from BT, which accounts for less than 5 percent of worldwide outgoing IDD,[87] would provide AT&T with an unfair advantage over its U.S. competitors. Developments since the FCC's decision in *BT/MCI II* thus have confirmed the soundness of Commission's determination in that proceeding that no restrictions are necessary to address the reorigination of third country traffic and require the same finding here.

D. The Global Venture is Consistent with the International Settlements Policy.

There is also no basis for Star's contention, at 6-7, that the Global Venture will engage in the impermissible "co-mingling" of AT&T and BT traffic in violation of FCC rules. AT&T and the Global Venture will comply with all applicable FCC rules and policies. Indeed, AT&T and BT's agreement on this critical point is set forth in the very paragraph of the exhibit to the Framework Agreement that is selectively quoted by Star, at 6 n.11. The Framework Agreement, Exhibit P (Principles For Operation of the International Carrier Services Unit), Introductory C states:

> "AT&T and BT agree that the ICS unit will operate as a single integrated business for correspondent, hubbing, alternative termination and other associated agreements; accounting rate, hubbing and alternative termination rate negotiations . . . taking into account the necessary transition required by its customers, its suppliers *and regulations*." (Emphasis added).

Star also overlooks that as a result of the WTO Agreement, and both recent and pending changes in FCC rules, the great majority of US international traffic soon will be no longer subject to present FCC regulations. The Commission has already authorized ISR to eighteen countries accounting for almost half of all US international

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87 *See TeleGeography 1997/1998.*

traffic.[88] The enforcement of benchmark rates on routes to all high income countries as of January 1, 1999, and to all high middle income countries as of January 1, 2000, will make routes accounting for three-fourths of all US-outbound international calls and ninety percent of all US-inbound international calls eligible for immediate ISR authorization, and thereby no longer subject to settlement rates or proportionate return.

Similarly, routes to all countries will be eligible for ISR once benchmark rates are required and enforced for all countries as of January 1, 2003. Additionally, as described above, the Commission is soon likely to remove present ISP restrictions with nondominant carriers on all WTO routes and with all carriers on competitive routes.

A significant purpose of the Global Venture is to take advantage of these emerging opportunities resulting from market liberalization and the relaxation of existing regulatory restrictions to reduce traffic costs and consumer prices through the use of more efficient routing arrangements. *See* Application, at 16-17. As described by *TeleGeography 1997/1998*, which is edited by counsel to Star, "Market liberalization will enhance this [refile] trend as new routes open and new entrants to the market provide multiple choices for carrier traffic."[89] Under the Commission's pending proposals, US carrier arrangements with these non-dominant new entrants will not be subject to the ISP.

Star also fails to acknowledge that the issues it raises regarding BT correspondent agreements were present, and rejected by the Commission, in *BT/MCI II*.

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[88] *See, e.g., International Bureau Authorizes ISR Between the United States and Japan*, FCC News Release No. IN 98-35, June 30, 1998 (announcing that "U.S. carriers can now send 46% of all U.S. international traffic outside of the traditional settlements system").

[89] *TeleGeography 1997/1998* 41 (Gregory C. Staple ed., 1997).

The Commission emphasized that "any U.S. carrier authorized on [the US-UK route] has the ability to engage in switched hubbing."[90] The Commission further recognized that MCI traffic switched hubbed through the UK would potentially benefit from BT's correspondent agreements. It stated that "BT/MCI may have a short-term advantage due to BT's greater number of correspondent relationships on UK-third country routes" but found no indication that "BT's competitors will be disadvantaged in establishing correspondent relationships on U.K.-third country routes such that restrictions on BT/MCI's ability to engage in switched hubbing on the U.S.-U.K. route are warranted."

There is even less reason to impose any special conditions on these activities today than in 1997, because the additional global liberalization following implementation of the WTO Agreement, the proliferation of ISR, and the proposed liberalization of the ISP further encourage all US carriers to engage in hubbing and reorigination activities.[91] Additionally, BT's market share of UK international services has now fallen below 50 percent, OFTEL has licensed more than one hundred UK international facilities-based carriers, and many of those new competitors provide service between the UK and third countries.

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90 *BT/MCI II*, ¶ 313.

91 BT's accounting rates are published by OFTEL and it is expected that the Global Venture's UK accounting rates will be published when the Global Venture takes over the management of BT's correspondent agreements. Star, as well as any other UK operator, will be able to interconnect with BT in the UK at published rates to receive the benefits of the Global Venture" accounting rates. It is expected that such operators will also be able to obtain service directly from the Global Venture in either the US or the UK to accomplish the same thing. Star can also negotiate its own direct relationship with a destination country or one with another indirect carrier.

Level 3 similarly ignores this extensive and growing competition to BT for services on UK-third country routes in requesting, at 13, restrictions on "exclusive transit" and offers no reason to disturb the Commission's finding in the *Foreign Participation Order* that "exclusive arrangements involving the joint handling of basic U.S. traffic originating or terminating in third countries" should not be subject to the "no special concessions" rule.[92]

E. The Global Venture Will Have No Adverse Effects on Competition For Transit Services.

C&W's claim, at 10, that the venture will reduce competition for transit services on "thin" routes also fails to withstand even a modicum of scrutiny. The Commission found in the 1996 *International Non-Dominance Order* that AT&T is the exclusive U.S. facilities provider on only four very small routes: Madagascar, Western Sahara, Chagos Archipelago (also known as Diego Garcia), and Wallis and Futuna.[93] The Commission further found that the *de minimis* (0.0025 percent) share of total U.S. outgoing minutes accounted for by these routes "cannot justify the economic costs of dominant carrier regulation" of AT&T because "such regulation can actually impede,

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[92] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, ¶ 166 (1997) ("*Foreign Participation Order*").

[93] *International Non-Dominance Order*, ¶¶ 33, 94.

rather than promote competitive market conditions."[94] The same forbearance should apply here.[95]

Specifically addressing transit services, the Commission further noted in the *International Non-Dominance Order* that "U.S. facilities-based suppliers may enter all markets much more easily than a decade ago, whether through direct operating agreements, indirect transit arrangements, or 'switched hubbing' via U.S. international private lines."[96] Moreover, "[b]ecause multiple U.S. carriers now have operating agreements with all but the smallest IMTS markets, U.S. carriers have available to them many more transit options than in 1985."[97]

C&W also ignores the highly competitive nature of the global transit and business, with approximately 60,000 routes to the 240 countries in the world, and in which any international carrier can use spare capacity to supply transit services with little or no additional investment. Virtually every major carrier participates in the transit business, including C&W, which is one of the largest suppliers of transit and refile services. Therefore, carriers seeking to send their traffic on an indirect route can use multiple suppliers and seek multiple prices -- whether hubbing through a transit provider or through a reorigination provider.

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94 *International Non-Dominance Order*, ¶ 97.

95 AT&T itself relies upon transit services from non-U.S. carriers for service on three of these routes and uses its own facilities only for service to Chagos Archipelago.

96 *Id.* ¶ 35.

97 *Id.* ¶ 35 n.64.

As a result of the fierce competition among international carriers to provide transit services, AT&T's average per minute revenue for transit service has declined by an average of 24 percent per year since 1995. A further demonstration of the highly competitive nature of this market, and the Commission's longstanding recognition of this fact, is that the Commission traditionally has declined to regulate in this area.

Thus, if C&W is correct in its claim, at 10, that AT&T and BT together account for 60 percent of transit services to C&W on any route, this is solely by choice of C&W, which can readily obtain these services at competitive rates from alternative suppliers. There is no reasonable likelihood that the Global Venture will have any adverse effects in the global transit market.

III. AT&T And The Global Venture's Entities Will Comply With Section 63.14, The Commission's "No Special Concessions" Rule, And Will Fulfill Their Obligations As Common Carriers.

A. Neither The Global Venture Entities Nor AT&T Will Accept "Special Concessions" From BT.

TLTD, US LLC, and AT&T will comply with all applicable rules and policies, including Section 63.14 of the Commission's rules.[98] This rule, known as the "No Special Concessions" rule, prohibits US carriers from accepting from foreign carriers with market power, certain exclusive arrangements involving telecommunications services on the foreign end of a US international route. Several commenting parties seek clarification that none of the Applicants will accept special concessions from BT, a "foreign carrier" that the FCC has classified as "dominant" in the

[98] 47 C.F.R. § 63.14(a) and (b).

UK.[99] The Applicants can assure the commenting parties that, as established in the FCC's rules, neither TLTD, US LLC, nor any other Global Venture entity will accept from BT exclusive arrangements relating to the provision of basic telecommunications services in the UK that are not offered to similarly situated US carriers.

For its part, AT&T similarly will not accept special concessions from BT. Indeed, AT&T will not directly interconnect to BT's network or directly buy relevant services from BT. Only the Global Venture will interconnect with BT's network and directly buy relevant services from BT.[100] In addition to the obligations of the US-

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[99] MCI WorldCom at 10; Level 3 at 12; Sprint at 7 n.4; Star at 5. *See BT North America, Inc.*, 13 FCC Rcd. 5992 (Int'l Bur. 1997) (classifying BTNA as dominant on the US-UK route due to its affiliation with BT). The Applicants note that, in light of changing market conditions in the UK, they do not believe that BT should continue to be classified as "dominant" in the future, but they do not contest this issue in the present proceeding.

[100] The Global Venture entities are described fully in the Public Interest Statement and the applications filed as part of the Application:

- VLT Co. LLC (US LLC), a Delaware limited liability company that has applied for Section 214 authority, will own and operate all Global Venture facilities located within the 12-mile US territorial limit, and will physically interconnect its facilities with US domestic networks.
- Violet License Co. LLC (US Sub LLC), a Delaware limited liability company, owned by US LLC, will acquire the Global Venture's earth station licenses from AT&T, having applied for Section 310 authority to do so.
- TNV [Bahamas] Ltd. (TLTD), a Bahamas corporation that has applied for Section 214 authority, will own and operate all facilities located outside both the US and UK territorial limits.
- Concert Communications Company (UK Co), a UK corporation, will own and operate all facilities within the 12-mile territorial limits of the UK, and will interconnect its facilities with BT's network and other UK carriers.

(. . . continued)

licensed carriers to comply with the FCC rules, BT is subject to strict UK regulatory requirements, set out in its license and enforced by OFTEL, that prohibit it from engaging in undue preference or discrimination, including preference of its subsidiaries or affiliates, with respect to the supply of telecommunications services.[101]

B. The "No Special Concessions" Rule Does Not Apply To Relationships Among AT&T and The Global Venture Entities.

1. Internal Transactions Among IXC Affiliates Are Not Regulated.

Some parties contend that AT&T should not be allowed to accept special concessions from the Global Venture.[102] But neither the "No Special Concessions" rule nor common carrier obligations apply to the internal transactional relationships among the Global Venture entities and between those entities and AT&T. The Global Venture

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(. . . continued)

- TNV [Netherlands] BV, a holding company, will own (directly or indirectly) US LLC, TLTD, and UK Co. In turn, the holding company will be owned, directly or indirectly, equally by AT&T and BT. The holding company does not require any Section 214 authorization because it will not provide any services.

- US LLC and TLTD will sell the Global Venture's services to carriers or end users in the US; UK Co. will sell such services in the UK; TLTD will manage all correspondent relationships.

- Each of these Global Venture entities will provision network facilities and functionalities to one another and to AT&T. UK Co. will be the only Global Venture entity to interconnect directly with BT. It will purchase services from BT in accordance with BT's published rates and terms, in compliance with UK regulatory requirements as enforced by OFTEL.

101 *See supra* n.61 and accompanying text.

102 MCI WorldCom at 10; Level 3 at 13; Star at 9-10.

entities will be common carriers in their dealings with third parties, but they will not transact business on this basis with one another or with their US affiliates. Nor are they required to do so. It is common practice and perfectly lawful for affiliated entities to employ unregulated transfer pricing between themselves. No competitor could claim the right to use an interexchange carrier's network facilities or functionalities at that carrier's internal cost. AT&T and BT have chosen to structure their relationship by using the Global Venture entities for the internal provisioning of international network facilities and services -- while still ensuring that services and facilities are always purchased from BT on a non-discriminatory basis. The benefits of the Global Venture also will be made available to third parties on a common carrier basis. No party can identify any public detriment arising from such internal provisioning to corporate affiliates by common carriers, and no competing carrier will be hurt by this arrangement.[103]

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[103] *See Ad Hoc Telecomms. Users Committee, et al., Applications for Review, AT&T's Comparably Efficient Interconnection Plan for Transaction Services,* 4 FCC Rcd. 4544, 4545, ¶ 10 (1989) (a carrier is not required to charge or impute to itself the tariffed rate for an underlying basic service when it provisions that service to itself as an input to another basic telecommunications service). Moreover, AT&T is not subject to the Commission's Part 32 and Part 64 affiliate transaction rules, which apply only to dominant incumbent local exchange carriers. The Commission has not applied these rules to non-dominant interexchange carriers since the mid-1980s. *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order,* 2 FCC Rcd. 1298, 1300, ¶ 4, *recon.* 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd. 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v.* FCC, 896 F.2d 1378 (D.C. Cir. 1990). The Commission has made it clear that AT&T is to be treated no differently from other non-dominant interexchange carriers. *AT&T Non-Dominance Order,* 11 FCC Rcd. 3271 (1995), *recon.* 12 FCC Rcd. 20787 (1997); *International Non-Dominance Order,* 11 FCC Rcd. 17963 (1996).

2. The Global Venture Entities Do Not Possess Market Power.

Moreover, to the extent that any of the Global Venture entities may be considered a "foreign carrier," none is subject to the "No Special Concessions" rule because none of them "possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market."[104] The Global Venture entities do not possess market power over markets that are defined to be "relevant" on the UK end of the US-UK route – "international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services, and local access facilities or services . . . ."[105] As an initial matter, none of the Global Venture entities will own or provide any local access, inter-city, or backhaul facilities or services in the UK; the Global Venture's facilities and services terminate at the cable stations in both the UK and the US.[106] Below, the Applicants demonstrate that the Global Venture lacks market power over the UK end of international transport on the US-UK route and cable landing station access in the UK.

UK End of International Transport. The Global Venture entities do not have market power over international transport facilities or services on the UK end of the US-UK route. As the Commission concluded in its decision in *BT/MCI II,* capacity on the US-UK route – specifically, on the UK end of the route – is increasing

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104 47 C.F.R. § 63.14(a); *see also* 47 C.F.R. § 63.10(a).

105 47 C.F.R. § 63.10(a).

106 The Global Venture also will own international switches.

dramatically.[107] This trend toward greater international transport capacity, and toward a reduction in BT's market share, has only accelerated since the FCC decided *BT/MCI II*.[108] There are now over one hundred companies holding UK licenses authorizing provision of international services over their own facilities. Many new UK licensees, including Global One and MCI WorldCom, also hold US licenses and can offer end-to-end competition on the route. In addition, many operators serve this market through international simple resale of leased lines and through switchless resale.

Moreover, recent data demonstrate that BT's share of outbound international traffic on the UK end of the US-UK route is approximately 50 percent or less. The Global Venture will inherit from BT its outgoing international transport beginning at the cable stations. As of the fourth calendar quarter of 1997, according to OFTEL and BT data, BT's share of outgoing IDD traffic (which can be expected to flow over the Global Venture in the future) was only 48.0%.[109] BT's share of international private line circuits on the UK end of the US-UK route is even smaller -- about 32.6 percent as of 1998. Moreover, BT's and AT&T's combined share of cable capacity on the UK end of the US-UK route (all of which is ultimately to be transferred to the Global Venture) as of October 31, 1998 was 14.37 percent, and by year end 2000 the Applicants project that share to decline to 5.04 percent. Because AT&T's "foreign affiliate [the Global Venture] lacks 50 percent market share in the international transport . . . market[]

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107 *BT/MCI II*, ¶¶ 140-41, 165.

108 *See* Application, Public Interest Statement, at 25-29.

109 *See* OFTEL Market Information Update (August 1998). If AT&T's very small share of UK-originated traffic were added to BT's share, the combined amount may very slightly exceed 50 percent.

on the foreign end of the [UK] route, the U.S. carrier [AT&T] shall presumptively be classified as non-dominant."[110] The Global Venture does not have the ability to exercise market power in the provision of international transport, inter-city or local access facilities or services from the UK.

UK Cable Landing Stations. Nor will the Global Venture's ownership of the UK cable landing stations owned today by BT give the Global Venture market power enabling it to adversely affect competition in the US. As the Commission found in *BT/MCI II*, no barriers to entry restrict construction of new cable landing stations and many carriers are in the process of doing so, Further access to the cable stations now owned by BT is regulated by OFTEL in the same way as other interconnection products provided by BT, and is therefore subject to the same rules in respect of cost-based pricing and non-discrimination.[111] Subject to OFTEL's finalizing the licensing arrangements for the Global Venture, BT expects access to the Global Venture's cable landing stations to be regulated in the same way as they are at present under BT's ownership. No party seriously challenges the Applicants' showing that the process of competitive construction of cable landing stations is continuing and accelerating.[112]

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110 47 C.F.R. § 63.10(a)(3). Moreover, even if that presumption did not apply, the facts set forth above establish that the Global Venture lacks market power. The Commission has found AT&T to be non-dominant even in markets in which it had greater than 50% market share. *International Non-Dominance Order*, 11 FCC Rcd. 17963, ¶¶ 37-41 (1996), *recon.*, 13 FCC Rcd. 21501 (1998) ("AT&T's IMTS market of 59 percent in 1994 was only a few percentage points higher than its domestic market share and we see no reason based on market share data to regulate them differently.").

111 *BT/MCI II*, ¶¶ 167-68.

112 *See* Application, Public Interest Statement, at 30-31.

In sum, the Global Venture entities will not possess market power, and all of the US-licensed applicants will comply fully with their duties as common carriers and with their obligations with respect to BT under the "No Special Concessions" rule.

C. AT&T Should Not Be Regulated As A Dominant Carrier On The US-UK Route.

The claim that AT&T should be subject to "dominant carrier" regulation on the US-UK route has no basis.[113] AT&T and BT are not "affiliates," because neither of them has any ownership in or control over the other. Specifically, the Commission rule defining "affiliation," Section 63.18(h)(1)(i),[114] has three elements, none of which will apply to AT&T and BT.

First, AT&T has no ownership interest in BT, so Section 63.18(h)(1)(i)(A) does not apply. Neither AT&T nor the Global Venture entities that are "controlled by it" has "a greater than 25 percent ownership of capital stock, or controlling interest at any level . . . in", nor "directly or indirectly controls a foreign carrier," i.e., BT.

Second, and similarly, BT has no ownership interest in AT&T, so the first sentence of Section 63.18(h)(1)(i)(B) does not apply. Neither BT nor the Global Venture entities that are "controlled by it" has "a greater than 25 percent ownership of capital stock, or controlling interest at any level, in" AT&T. Nor are any foreign carriers "investing in [AT&T]" in the context of a joint venture or market alliance.

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113 MCI WorldCom at 4-8; Sprint at 5-7.

114 47 C.F.R. § 63.18(h)(1)(i).

Third, the fact that the Global Venture entities are "affiliates" of both AT&T and BT does not make AT&T and BT affiliates of one another. The International Bureau recently rejected a "strict textual reading" of the last sentence of Section 63.18(h)(1)(i)(B), under which AT&T illogically might be deemed to be affiliated with BT (because the "the foreign carrier [BT] controls . . . a second foreign carrier [the Global Venture entities][115] already found to be affiliated with that U.S. carrier [AT&T]"). Specifically, the Bureau held:

> [T]he Commission did not intend an applicant to be considered an affiliate of a foreign carrier under the common control provision of Section 63.18(h)(1)(i)(B) unless the entity that controls both foreign carriers referenced in that provision has a greater-than-25-percent or controlling interest in the applicant. Absent such an interest in the applicant, the foreign carrier (and its controlling shareholder) would have insufficient incentive to use its foreign market power to discriminate in favor of the applicant, because neither the foreign carrier nor its controlling shareholder would derive a direct financial benefit from any discriminatory conduct in favor of the applicant.[116]

The same rationale applies even more strongly in this case. Sprint's contention that AT&T would be a beneficiary of BT's ability and incentive to discriminate in favor of the Global Venture entities is unfounded, and does not warrant classifying AT&T as dominant.[117] First, consistent with the International Bureau's analysis in *Cable & Wireless*, BT has no incentive to discriminate in favor of AT&T by virtue of its shared control of the Global Venture entities with AT&T, because BT is not

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115 Moreover, this analysis could make sense only to the extent that any of the Global Venture entities would be considered a "foreign carrier" under Section 63.18(h)(1)(ii). *See infra* at 60.

116 *Cable & Wireless, Inc.*, DA 98-2498, ¶ 8 (Int'l Bur., rel. Dec. 8, 1998).

117 Sprint at 6-7.

receiving any direct financial interest in AT&T. Second, AT&T will not interconnect or exchange traffic directly with BT, but will work through the Global Venture entities. The fact that the Global Venture entities, as "affiliates" of BT, will initially be regulated under the Commission's "dominant carrier" doctrine, fully addresses any potential BT discrimination, and prevents AT&T from benefiting from any such discrimination. Classification of AT&T as dominant is simply unfounded in the regulations and unnecessary. Third, Sprint can cite no provision in the Framework Agreement that would (as Sprint alleges) "arrange wholesale prices such that increased profits realized by AT&T at the retail level as a result of BT discrimination are transferred upstream to the joint venture entities."[118] In fact, no such pricing provision exists. In the absence of BT investment in AT&T, the creation of the Global Venture does nothing to facilitate discriminatory conduct.

Finally, as discussed at length above,[119] the Global Venture entities do not possess market power, and so AT&T should not be regulated as a "dominant carrier" because of its affiliation with these entities to the extent any of these entities qualify as "foreign carriers." The entities are affiliates of BT, and since the Applicants have not attempted to demonstrate in this proceeding that BT lacks market power in the UK, the regulated entities – TLTD and US LLC – initially will be subject to "dominant carrier" regulation on the US-UK route. But the fact that the Global Venture entities will be treated as "dominant" for purpose of the Section 63.10(c) safeguards does not mean that those entities possess "sufficient market power on the foreign end of the route to affect

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118 Sprint at 7.

119 *See supra* at Section IIIB2.

competition adversely in the U.S. market."[120] Since, as shown above, the Global Venture entities do not possess such market power on the US-UK route, AT&T cannot be regulated as a dominant carrier on that or any other route.[121]

IV. The Commission Must Not Impose Conditions Related To BT's Regulation By The Government Of The United Kingdom.

Some commenters would use this proceeding to address UK regulatory policies on local loop unbundling[122] and equal access (also known as carrier pre-selection and dialing parity).[123] That inquiry is inappropriate and unnecessary in this case.

Whether or not BT has implemented loop unbundling, or a particular form of carrier pre-selection and dialing parity, is totally irrelevant to the transaction at issue in this proceeding. Unlike the proposed BT-MCI merger, BT's local offerings will not be a component of the Global Venture. As stated above, the Global Venture will purchase all services from BT on an arm's-length, non-discriminatory basis, at exactly the same rates, terms, and conditions that apply to all competing carriers. Similarly, the Global Venture

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120 47 C.F.R. §§ 63.10(a)(3), 63.14(a).

121 Star also questions whether the Global Venture's ownership of facilities on both the US and UK sides of the international circuits violates Section 63.10(c)(2)(ii) of the Rules, which states in part that "[t]he authorized carrier shall not jointly own transmission or switching facilities with its affiliated foreign carrier." The Global Venture does not violate the rule. Neither AT&T, BT nor any Global Venture entity will own any facility or switch jointly with one another. *See supra* note 100 for a description of the entities that will own distinct transmission or switching facilities.

122 MCI WorldCom at 12-16; Level 3 at 8; C&W at 16.

123 Level 3 at 9-10; Sprint at 9-10; GTE at 18-20; Esprit at 1-3.

will provide its services to BT and to all other operators in the UK at the same published rates terms, and conditions. UK policies relating to local competition are thus entirely irrelevant.

Second, the Commission held only recently, in *BT/MCI II*, that "there is an effective regulatory framework in the United Kingdom that develops, implements and enforces legal requirements, interconnection and other competitive safeguards."[124] It also held that the interconnection regime and competitive safeguards that apply to BT provide reasonable and nondiscriminatory opportunities for competing US carriers to enter the UK market.[125] In light of these findings, the Commission has no need to investigate once again the openness of the UK marketplace .

In all events, given that OFTEL has long been recognized by the FCC as an effective and independent regulator, the FCC can properly rely on OFTEL's current review of local loop unbundling in the UK, and need not impose its own conditions. Notably, OFTEL has recently opened a new examination of loop unbundling issues:

> OFTEL explained its position on local loop unbundling and indirect access in its 1996 *Statement on Indirect Access, Equal Access and Direct Access to the Copper Loop.* In that statement, OFTEL made a commitment to review the question of local loop unbundling should there be significant changes in UK markets. . . . Major changes are now taking place in UK markets, particularly as

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124 *BT/MCI II*, ¶ 246; *see also id.* ¶¶ 239-46.

125 *BT/MCI II*, ¶¶ 216, 224-238. "Although [parties] are correct in pointing out that there are differences between the U.K. and the U.S. regimes, we do not require, for purposes of our ECO analysis, that a foreign interconnection regime be identical to our own." *Id.* ¶ 225.

> volumes of data traffic start to exceed voice and as packet switching technology evolves the potential of UK networks.[126]

BT will comply with whatever policies OFTEL may adopt as a result of this policy review.

Similarly, the Commission should also defer to OFTEL's ongoing process of implementing the EC's directive on carrier pre-selection.[127] Pursuant to the implementation schedule adopted by OFTEL, BT expects to have fully implemented carrier pre-selection for national and international calls by December 2000, and for "all calls" (including local calls, which are excluded from the equal access implementation plans of many other EU member states) by December 2001.[128] The FCC need not engage in a *de novo* review of OFTEL's pro-competitive equal access policy.

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[126] UK Office of Telecommunications, *Access To Bandwidth: Bringing Higher Bandwidth Services To The Consumer,* A Consultation Document issued by the Director General of Telecommunications, § 1.8 (Dec. 1998) (available at http://www.oftel.gov.uk/competition/llu1298.htm). It is worth noting that OFTEL recently examined BT's offering of leased lines (comparable to private lines or special access in the US). OFTEL noted that leased lines can be used in lieu of unbundled loops, and concluded that BT's rates are cost-based and reasonable by comparison with rates in effect in other countries. UK Office of Telecommunications, *National Leased Lines in the UK: Summary of OFTEL's Investigation* (Jan. 1999) (available at http://www.oftel.gov.uk/competition/lls0199.htm).

[127] The requirement to provide Carrier Pre-Selection ("CPS") in the UK was imposed by EU Directive 98/61/EC (24 September 1998). Directive 98/61/EC takes the form of an amendment to the EU Interconnection Directive 97/33/EC (30 June 1997). This Directive implemented a "Common Position" adopted by the Council of the EU on 12 February 1998.

[128] Unlike incumbent operators in several other European Member States, BT does not have local exchanges with a built-in capability to provide CPS. Even BT's Ericsson exchanges have UK specific software, unlike similar exchanges supplied elsewhere in Europe. This is the main reason for the requirement in the UK for a major effort to modify BT's local exchanges and the associated operational support systems. It is also the case that these software modifications have to be phased in with other major software programs related to major numbering changes in the UK, and to Y2K.

The Commission can therefore proceed confidently and expeditiously to grant the applications before it without a needless diversion into matters that are now in the hands of a competent regulator of a foreign market that the Commission has only recently determined provides open and competitive opportunities to US carriers.

V. The Commission Does Not Need To Impose Conditions Related To AT&T's Ownership Of Domestic Facilities In The United States Or The United Kingdom.

A. No Conditions On The Global Venture's Formation Are Required By AT&T's Cable Station Ownership.

Sprint's claims that conditions are required to address AT&T's ownership of US cable stations have nothing to do with the transaction and are contradicted by the Commission's prior findings that AT&T's ownership of U.S. cable stations does not raise competitive concerns. The Commission has repeatedly emphasized that disputes among consortia co-owners, which Sprint raises here, are contractual matters to be addressed under C&MA procedures. Sprint neither distinguishes those dispositive findings nor shows that it has made any reasonable effort to pursue its complaints under the relevant contractual procedures.

Sprint's new complaints raise no competitive or contractual issues as AT&T's provision of cable station access to new cable systems was pro-competitive in effect and consistent with its obligations to the consortia co-owners. Sprint in fact complains of actions by AT&T that have reduced the costs of Sprint and other consortia co-owners and of supposed delays by AT&T in matters that Sprint itself has failed diligently to pursue. Sprint's baseless and irrelevant claims provide no basis for imposing any conditions on the transaction.

1. The Commission Has Made Clear That Cable Station Disputes Are Contractual Matters That Do Not Raise Competitive Concerns.

In response to the similar claims advanced by Sprint in the *International Non- Dominance* proceeding, the Commission made clear that "disputes over 'contractual arrangements,' such as access to and restoration of cable facilities" do not raise competitive issues but are simply contractual issues that are governed by each cable's Construction and Maintenance Agreement (C&MA) under which "none of the owners, including AT&T, holds a majority vote."[129] Thus "any of the submarine cable's owners (including Sprint) are free to raise their complaints in accord with the process established by each submarine cable's [C&MA]."[130] Additionally, the Commission has encouraged carriers "to raise these issues in the context of our oversight of construction and maintenance agreements for the introduction of future submarine cable facilities."[131]

The Commission has also repeatedly found that AT&T obtains no market power from its ownership interests in submarine cables or cable stations. In reaffirming AT&T's international nondominance just three months ago, the Commission emphasized that "the owners of a submarine cable can choose to land the cable at any one of several cable landing stations, including stations not owned or operated by AT&T."[132] Those

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129 *Id.*; *see also International Non-Dominance Order*, ¶ 61.

130 *Id.*

131 *International Non-Dominance Order*, ¶ 61.

132 *International Non-Dominance Reconsideration Order*, ¶ 26.

non-AT&T owned or operated stations "now include[] seven of eight cable stations that have become operational or for which plans have been finalized since 1996."[133]

Sprint concedes, at 12, that the proliferation of new cable systems "has resulted in an explosion of available cable capacity as well as capacity ownership by new and existing carriers." Sprint maintains, at 12, however, that AT&T possesses market power due to its purported "dominance over U.S. cable stations," alleging that "the construction of cable stations has remained virtually flat in comparison with the growth in cable capacity." This claim is meritless.

As Sprint itself ultimately recognizes, the relevant question is not how many cable stations are owned by AT&T, but rather whether there exists "sufficient cable capacity that does not terminate in AT&T cable stations," Sprint at 20 n.23 (emphasis added) to deprive AT&T of market power. As Sprint unwittingly concedes by stating that its cable station concerns will no longer apply "after two years," *id.*, the growth in cable capacity terminating at non-AT&T owned stations is anything but "flat." As supported by the accompanying affidavit of Thomas McInerney, Deputy Director, International Cable Management, AT&T, attests, by year end 1999, over 49% of cable capacity terminating at East Coast stations, and over 71% of capacity terminating at Carribean stations will terminate at non-AT&T owned stations. Indeed, by year end 2000 a majority (over 52%) of cable capacity terminating on the East Coast will terminate at

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133 *Id.*

non-AT&T owned stations. McInerney Aff. at 1, & Att.[134] Sprint's claims that AT&T exercises "bottleneck control" over cable facilities are therefore baseless.

At any rate, Sprint, at 11, requests a remedy -- the production of documents to co-owners concerning AT&T's use of "consortia-owned and financed assets" -- that is well within the scope of existing C&MA procedures. Accordingly, pursuant to the Commission's express direction in the *International Non-Dominance* proceeding, it is incumbent upon Sprint to pursue its concerns under those procedures. Sprint has failed to seek such redress and cannot now excuse this lack of diligence merely by asserting, at 19, that contractual remedies are "slow, cumbersome and expensive." Sprint has similarly failed to respond to the Commission's invitation in the *International Non-Dominance Order* to raise such concerns in connection with its oversight of C&MAs on future cables. Even if Sprint's complaints had merit -- which they do not -- Sprint's failure to pursue them under the procedures previously identified by the Commission for this very purpose should preclude their consideration here.

2. The AT&T Actions Challenged By Sprint Have Reduced US Carrier Costs And Benefited Competition.

Sprint complains because AT&T provided access to its cable stations for new transatlantic submarine cables operated by Global Crossing and provided restoration services for CANTAT-3. These complaints, on their face, raise no competitive issue. Far from abusing a "bottleneck" under the principles of *Terminal Railroad*, as Sprint

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[134] In order to avoid double counting, cable capacity associated with Carribean stations that serve predominantly as transit stations to South America is classified for purposes of these calculations as East Coast capacity rather than Carribean.

mistakenly contends, at 13, AT&T's actions increased the supply of US international facilities by other providers and were entirely pro-competitive in effect.

AT&T's actions also raise no issues under the C&MA agreements -- as demonstrated by Sprint's unwillingness to seek any contractual remedy. No consortium cable has exclusive rights to any cable station, and no C&MA requires prior co-owner approval before a station is used by an additional cable. Indeed, stations are frequently shared by multiple cables where sufficient space and other resources are available. For this reason, C&MAs, such as the Americas-II C&MA cited by Sprint, at 15 n. 16, provide that the co-owners of each cable shall pay only the share of cable station costs that is allocable to their particular cable.[135]

AT&T seeks to make reasonable efforts to accommodate new cables at its cable stations on a 'first come first served basis' to the extent that sufficient resources are available. Contrary to Sprint's repetitive and baseless accusations, at 10-17, AT&T's provision of cable station access to cables operated by Global Crossing and its subsidiaries ("Global Crossing") were consistent with the relevant C&MAs, resulted in no improper profit to AT&T, and had no adverse impact on the costs or services of the co-owners of the consortia cables using those stations.

Specifically, AT&T provided Global Crossing with otherwise unused duct access at the Shirley, LI Station for which the TAT 12/13 co-owners were fully

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135 *See also, e.g.*, TAT-12/13 C&MA, ¶ 2 ("Segments A,B,C, and D [including U.S. cable stations at Green Hill, RI and Shirley, LI] shall each consist of an appropriate share of land and buildings at the specified locations. . . ") (emphasis added).

compensated with a proportionate share of all the proceeds of the transaction.[136] The only effect of this AT&T action on the consortia co-owners was to reduce their facility costs. While AT&T is also providing Global Crossing with conduit space in the Hollywood, FL Landing, this is not "consortia-owned and financed" space, as Sprint asserts, at 15, but new construction that Global Crossing is financing in full. In further refutation of Sprint's baseless claims, at 15, there is no transaction involving St. Croix, and no basis to Sprint's further contention that AT&T sold "governmental and environmental permits" at Shirley, where Global Crossing was required to obtain its own permits.

Equally unfounded are Sprint's claims, at 17-18, that AT&T misused TAT-9 consortium assets to restore CANTAT-3 and profited unfairly from that activity. Sprint's charges concern an 88-day CANTAT-3 outage requiring both "dry" and "wet" side restoration. AT&T performed "dry" side restoration for this outage with no use of TAT-9 consortium assets and billed CANTAT-3 for this activity. For the "wet" side portion of the CANTAT-3 restoration, AT&T used TAT-9 equipment pursuant to its understanding that a mutual aid agreement existed between TAT-9 and CANTAT-3 under which each cable system would provide the other "wet" facilities for restoration purposes at no charge.

Without a mutual restoration agreement between TAT-9 and CANTAT-3, TAT-9 (in which AT&T has a larger ownership share than Sprint) would bill CANTAT-3 (in which Sprint has a larger ownership share than AT&T) the charge for the "wet"

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[136] Sprint incorrectly suggests, at 15-17, the existence of two transactions involving Shirley rather than one.

side restoration. Therefore, the effect of the wet-side restoration services provided free of charge by TAT-9 to CANTAT-3 of which Sprint here complains was to reduce the increased costs that otherwise would have fallen on Sprint as a larger co-owner of CANTAT-3 and to increase the net costs of AT&T as a larger co-owner of TAT-9.

Finally, there is also no basis to Sprint's claims, at 18-19, that AT&T sought to delay implementation of its *International Non-Dominance* commitment to provide IRUs for the dry-side portion of the digital access cross-connection equipment ("DACs") to the U.S. TAT-12/13 and TPC-5 co-owners. Although completion of this complex project has taken longer than expected, AT&T has also been delayed in these efforts by the failure of some US co-owners to provide timely comments on the draft IRU agreements and cost allocation information distributed in February 1997 and in revised form in November 1997. Even today, Sprint exhibits none of the urgency to obtain these IRU interests that its comments would suggest, as Sprint has yet to sign and return the final copy of the IRU agreement that AT&T provided more than seven months ago in July, 1998.

For these reasons, Sprint provides no justification for the imposition of the conditions it seeks on the transaction.

B. No Conditions Are Warranted Regarding AT&T's Ownership Of Its Interests In WorldPartners, AT&T-Unisource or Other Assets.

Esprit, GTE and other commenters have noted that AT&T holds interests in certain carriers, including WorldPartners, AT&T-Unisource and interests in the UK, that provide certain communications services in the UK and on other international routes. These commenters request that the Commission condition any grant of the Application on

AT&T's divestiture of certain of these interests or assets. *See, e.g.*, Esprit at 1; GTE at 13. No such conditions are necessary, or in the public interest.

First, no conditions are required concerning AT&T's interests in WorldPartners or AT&T-Unisource. AT&T's relationships with these consortia will terminate by the terms of the agreements entered into by those parties within the next 12 to 18 months.[137] Given the short term remaining for AT&T's participation in these consortia, and the absence of the investment of each of the participants in other members, the members of the consortia have no incentives to provide any advantage to the Global Venture. Similarly, AT&T has no incentive to provide any advantage to the members of the consortia. Indeed, it would harm competition to accelerate the termination of these agreements by regulatory mandate. Instead, the Commission should allow the members of these consortia to replace their carrier relationships under the terms of their agreements.

Second, for a variety of reasons, the Commission does not need take any action with regard to AT&T's interests in the UK. Initially, as established in the Application and in Section I above, AT&T's interests in the UK are *de minimis*. In any event, to the extent that AT&T's interests in the UK affect competition, OFTEL and the European Commission retain jurisdiction to order divestiture or otherwise regulate those interests to protect competition in the provision of domestic UK services.

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[137] The agreements that govern AT&T's participation in WorldPartners will expire on December 31, 1999. AT&T will exit AT&T-Unisource according to the contractual exit provisions included in the joint venture agreement forming AT&T-Unisource, which allow for a permitted exit any time after July, 2000.

Conclusion.

As the Applicants demonstrated in the Application, the proposed Global Venture will accelerate significantly the provision of new and competitive services to MNCs and other consumers of international communications services. Those public interest benefits have not been challenged, and in the instant Reply, the Applicants have put to rest the speculative fears of competitive harm alleged by those commenters seeking to preserve their current positions with respect to the provision of IP-based services. The Applicants have acknowledged their obligation to comply with the rules of the FCC that will govern the operation of the Global Venture. To serve the public interest, the Commission should grant the requested authorizations and permit the Applicants to commence expeditiously the development and provision of new, competitive international facilities and global services.

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